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Motion and Argument to Strike Out Parts of Answer

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1919

ORIGINAL, NO. 25.

STATE OF NEW MEXICO

vs.

STATE OF COLORADO

O. A. LARRAZOLO,
FRANK W. CLANCY,
*Counsel for Complainant.*

**MOTION TO STRIKE OUT PARTS OF ANSWER**

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Now comes the said complainant and assuming that Rule 33 of the Rules of Practice for Courts of Equity, is applicable to this case, or at least indicates the practice which this court considers preferable, moves the court to strike out from defendant's answer so much of Subdivision III thereof as is as follows:—

> "but defendant avers that said Carpenter survey and his field notes of the said boundary line were never confirmed by the Congress of the United States, nor by either the State of Colorado, or the Territory or State of New Mexico, but that, on the contrary, an effort was made to confirm the said Carpenter survey in the first session of the 60th Congress, by the introduction in the Senate of Senate Joint Resolution No. 78, which passed the Senate and the House of Representatives, and was submitted to the President for his approval, and that the said Joint Resolution was on the 19th day of December, 1908, upon the advice of the Attorney General of the United States, disapproved by the President and returned to the Senate with his objections thereto, which Resolution, upon the same day, was laid upon the table by the Senate, and no further action has since been taken thereon by Congress, and the said Carpenter survey, and boundary line as shown by said field notes, failed to become effective in any respect and was never recognized by the General Land Office of the United States as the boundary line between Colorado and New Mexico. A copy of said veto message of the President is hereto attached and made a part hereof,"

because the same is insufficient as a defense, or any part of

a defense to the allegations of the bill of complaint, and sets out matters which would be entirely irrelevant to any issue which can properly be raised in this case, and is therefore impertinent.

And complainant further moves the court to strike out of said answer all of Subdivision V thereof, except the two last paragraphs of that Subdivision, because the same is insufficient as a defense, or any part of a defense, to the allegations of the bill of complaint, and sets out matters which are entirely irrelevant to any issue which can properly be raised in this case, and is therefore impertinent.

O. A. LARRAZOLO,

FRANK W. CLANCY,

*Counsel for Complainant.*

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**ARGUMENT ON MOTION TO STRIKE OUT PARTS OF ANSWER**

## In the Supreme Court of the United States

ORIGINAL, NO. 25

STATE OF NEW MEXICO

vs.

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In this case the bill of complaint sets out a line shown by what may be called the Carpenter survey, made by Howard B. Carpenter, under a contract with the United States, dated July 7, 1902, by which he was to re-survey, re-establish and re-mark the boundary line between Colorado and the Territories of New Mexico and Oklahoma, and avers that said line is the true and correct boundary line between Colorado and New Mexico and that Colorado has assumed jurisdiction, as is admitted by the answer, over country south of said line, but the answer denies that the Carpenter line is the true or correct boundary line between the two states although it fails to set up what is the true and correct boundary.

The answer as well as the bill of complaint shows that the 37th parallel of north latitude is properly the boundary line, and the Carpenter survey, according to the instructions given to Carpenter, which begin near the foot of page 3 of the printed bill of complaint, was, in effect, for the purpose of correctly establishing and marking that parallel on the earth's surface.

Subdivision III of the answer, to a portion of which the motion to strike out is directed, after admitting that Carpenter did make a survey which was approved by the Commissioner of the General Land Office, proceeds as follows:—

> "but defendant avers that said Carpenter survey and his field notes of the said boundary line were never confirmed by the Congress of the United States, nor by either the State of Colorado, or the Territory or State of New Mexico, but that, on the contrary, an effort was made to confirm the said Carpenter survey in the first session of the 60th Congress, by the introduction in the Senate of Senate Joint Resolution No. 78, which passed the Senate and the House of Representatives, and was submitted to the President for his approval, and that the said Joint Resolution was on the 19th day of December, 1908, upon the advice of the Attorney General of the United States, disapproved by the President and returned to the Senate with objections thereto, which Resolution, upon the same day, was laid upon the table by the Senate, and no further action has since been taken thereon by Congress, and the said Carpenter survey, and boundary line as shown by said field notes, failed to become effective in any respect and was never recognized by the General Land Office of the United States as the boundary line between Colorado and New Mexico. A copy of said veto message of the President is hereto attached and made a part hereof."

The matter above quoted is attacked by the motion to strike out; and complainant submits to the court that it is of no importance whether the Carpenter survey was ever approved by Congress, the issue properly being whether the survey is correct or not, and no action by Congress could have made it correct if it really were not, nor could any action, or non-action, by Congress have made it incorrect if it were really correct, because Congress was without power to settle the question of a state boundary, jurisdiction as to such a question being vested in this court alone, as is substantially shown in the veto message of President Roosevelt, which appears on page 6 of the printed answer, where it is set out that to establish the true boundary line, an appropriate method would be to invoke by appropriate proceedings the original jurisdiction of this court. The United States might have instituted proceedings to invoke that jurisdiction as is established by U. S. vs. Texas, 143 U. S. 621, but the government

did not do so, and New Mexico as a Territory could not do so, but, as a State it has now invoked the jurisdiction of this court.

Obviously it is equally unimportant that the Carpenter survey has not been recognized by the General Land Office as no action or non-action by that office could change the location of the 37th parallel of latitude on the earth's surface.

The allegation in the answer that the Carpenter survey "failed to become effective in any respect" is not an allegation of fact but a statement of a mere conclusion on the part of the pleader.

There is nothing in the matter quoted from Subdivision III of the answer which can have any effect upon the ascertainment by this court of where the said 37th parallel is upon the earth's surface which is the vital question to be herein determined.

The motion to strike out is also aimed at Subdivision V of answer, excepting the two last paragraphs thereof. The matter objected to is as follows:

> "For further defense to said bill of complaint, this defendant avers that in the Act of Congress, approved March 3rd, 1875, to enable the People of Colorado to form a Constitution and State government, and be admitted into the Union, (18 Statutes at Large, 474), and also by the Constitution adopted by the vote of the People of Colorado, and under which the State of Colorado was admitted into the Union by Proclamation of President Grant, August 1st, 1876, the 37th parallel of North latitude between the 25th and 32nd meridians of longitude West from Washington, was fixed as the southern boundary line of that State; that pursuant to authority of an Act of Congress, approved March 2nd, 1867, (14 Statutes at Large, 466), Ehud N. Darling, United States Surveyor and Astronomer, by the most approved methods of the time, surveyed and established in the year 1868, the 37th parallel of North latitude so far as it constituted the boundary line between the Territories of Colorado and New Mexico, and marked the same upon the earth's surface by mile corners and monuments, a copy of which survey together with the field notes of his work is attached hereto and made a part hereof, which field notes of said survey were examined and approved on the 30th day of April, 1869, by the Honorable Joseph S. Wilson, Commissioner of the General Land Office, as ap-

pears by his certificate to that effect attached to said field notes.

Defendant avers that for more than thirty (30) years, the position of the said Darling line remained undisputed, and the correctness of its technical execution unquestioned, and as so established the said Darling line has been generally recognized and acquiesced in by both of the States herein involved, and accepted by the Federal government, and is now recognized and accepted by the Federal government as the true and subsisting boundary line between Colorado and New Mexico; and by reason of the right and title acquired as hereinbefore set forth, this defendant from the time said boundary was so established in 1868 to the present time, has held lawful and rightful possession of and exercised dominion and sovereignty, and now claims the same, over the territory down to the said southern boundary line as established by the said Darling, and no further; county lines have been formed, towns and settlements have grown up, school districts, voting precincts, land districts and water districts have been created with reference to said line, public officers have been elected, property has been assessed, taxes levied and collected under the authority of the State of Colorado and its courts of both civil and criminal jurisdiction have exercised unquestioned jurisdiction in all places North of said boundary line, and the State of New Mexico has exercised like jurisdiction in all places South of said line. County maps, State maps and maps prepared by the Federal government have for more than forty years last past delimitated said boundary according to said Darling survey, and government post offices have been established as being in Colorado when above said line, and in New Mexico when below said line, and public land surveys on both sides of said line were closed thereon, lands have been disposed of, rights acquired and political boundaries in both Colorado and New Mexico fixed by reference to said line.

The 37th parallel of North latitude, as established by Howard B. Carpenter, passes through several towns lying wholly within the State of Colorado, according to the boundary as originally surveyed by Darling, and along the entire line there is a material, and in many places, excessive variance between the lines of the two

surveys, and the effect of said Carpenter survey if declared the true boundary line would be to remove a considerable strip of territory which is now within the State of Colorado, according to the Darling survey, and place it in the State of New Mexico.

The stone monument established by Capt. Macomb U. S. A. of the Topographical Bureau in 1858, under direction of the War Department, marking the intersection of the 37th parallel of North Latitude with 103 degrees of West Longitude from Greenwich, adopted as the initial point of the Darling Survey, was designated as the northwest corner of Indian Territory, now State of Oklahoma, in 1874 by John J. Major, U. S. Surveyor and Astronomer, in the survey and marking of the boundary between Indian Territory and Colorado Territory. The line attempted to be established by said Carpenter passed 93 lks. south of said Macomb monument and departed from the boundary lines established by both Darling and Major, and said Corpenter obliterated the marks upon said Macomb monument, theretofore and since hitherto recognized as the corner upon the south line of Colorado and comon to the States of New Mexico and Oklahoma, and attempted to relocate said common corner at a point about two miles easterly from said long established and accepted Macomb monument.

The said Carpenter survey consisted of a new fixation of the 37th parallel of North latitude independent of the line established by Darling in 1868, and not only failed of confirmation by Congress, but the Federal government up to the present time has declined to recognize the said Carpenter survey as the true boundary line between the said two states, and on the cortrary has accepted and still accepts the said Darling survey as the true and correct boundary line between said two states."

It will be seen that while the answer sets up the making of a survey of the line in 1868 by a person named Darling, which was approved by the Commissioner of the General Land Office in 1869, yet it does not anywhere allege that the Darling survey was correct, although there is an averment of its correctness in defendant's cross-bill. The averment that the position of the Darling line for more than 30 years remained undisputed and the correctness of its technical execution unquestioned and that it has been generally recognized by both states and accepted by the federal government as the

true boundary line between Colorado and New Mexico, and the allegations as to exercise of sovereignty in accordance therewith by Colorado and New Mexico, and as to county, state and United States maps, post offices and public land surveys, set out no facts which are worthy of consideration by this court in arriving at a conclusion as to where the 37th parallel is on the earth's surface. The court will take notice of the fact that New Mexico did not come into existence as a state until January 6, 1912.

The averment that the 37th parallel of north latitude was fixed as the southern boundary of the state of Colorado, cannot raise any issue in this case as the bill of complaint alleges, in substance, the same thing, and the answer in Subdivision II thereof substantially admits this allegation of the bill to be correct. This averment in the answer is clearly superfluous and subject to the objection stated in the motion to strike out.

The allegations as to the effect of declaring the Carpenter survey to be the true boundary line, sets out matter which is of no value to this court in its effort to ascertain whether that survey correctly locates the 37th parallel; and the allegations as to the Macomb monument, the obliteration by Carpenter of marks thereon, and its distance of 93 links from the Carpenter line, are equally valueless to the court in the present case and add nothing of substance to what is contained in the bill of complaint as will appear by reference to page 344 of the printed bill.

The object of the motion to strike out is not in any way to embarrass defendant in the presentation of its defense, but only to get rid of immaterial and irrelevant matters, and to avoid the presentation of testimony as to such matters which would unnecessarily encumber the record and could have no effect except to confuse and delay.

The case presented by bill, answer and cross-bill, when stripped of the extraneous matters, is this:—Complainant relies upon the Carpenter survey as showing the true boundary line; defendant denies this, and appears to rely upon the Darling survey as showing the true line. The object of the parties is, or ought to be, to ascertain by the judgment of the court, which is correct.

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